

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK EDWARD RAAK,

Defendant-Appellant.

UNPUBLISHED

March 23, 1999

No. 199248

Cheboygan Circuit Court

LC No. 96-001521 FH

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and sentenced to a term of 36 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

On the day of trial, the trial court ruled that if defendant took the stand the prosecutor could impeach defendant with two prior plea-based convictions for attempted conspiracy to commit perjury and attempted perjury. Defendant did not testify at trial. An evidentiary hearing was subsequently conducted in the trial court on defendant's claim that he was denied the effective assistance of counsel because defense counsel failed to advise defendant that in order to preserve the impeachment issue for appellate review defendant had to testify at trial. See, generally, *People v Finley*, 431 Mich 506; 431 NW2d 19 (1988). Finding no ineffective assistance of counsel, the trial court denied defendant's motion for a new trial. On appeal, defendant again raises the same argument he made below.

To find that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

At the evidentiary hearing, the trial court found that counsel's performance had not been objectively unreasonable because counsel had "informed defendant of the various legal matters during

the pendency of the case” We agree with the trial court in light of counsel’s testimony that at one of his initial meetings with defendant he had explained to defendant that with respect to defendant’s prior convictions defendant might be required “to take the stand and then let the judge decide the prejudicial effect” of the prior convictions.

Moreover, even assuming that counsel did err by not informing defendant at trial that he had to testify in order to preserve the impeachment issue for appellate review, we conclude that defendant has failed to establish that he was prejudiced by any such error. First, the trial court found that even if it had ruled that defendant could not be impeached with his prior convictions, defendant would still not have testified. We agree in light of counsel’s testimony that even if the trial court had excluded the impeachment evidence he still would have recommended, albeit not as strongly, that defendant not testify because he believed that defendant “would not make a good witness.”

Second, even assuming that but for counsel’s alleged error defendant would have taken the stand and denied committing the offense but then would have had his credibility impeached with his prior convictions, we cannot say that the jury would have had a reasonable doubt respecting defendant’s guilt where the trial court specifically found that the complainant’s testimony was circumstantially corroborated by the testimony of other witnesses and that the prosecution witnesses were credible. *People v Mitchell*, 454 Mich 145, 166; 560 NW2d 600 (1997).

And finally, even assuming that but for counsel’s alleged error defendant could now raise the impeachment issue on appeal, defendant has not offered any legally viable challenge to the admissibility of his prior convictions under MRE 609 that would require reversal of his instant conviction on appeal and remand for a new trial. *Id.* at 163.

Because defendant has failed to establish his claim of ineffective assistance of counsel, we conclude that the trial court did not abuse its discretion in denying defendant’s motion for a new trial on this ground. *People v Winstanley*, 20 Mich App 528, 529; 174 NW2d 170 (1969).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck